



# बिहार गजट

## असाधारण अंक

### बिहार सरकार द्वारा प्रकाशित

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17 माघ 1940 (श०)  
(सं० पटना 195) पटना, बुधवार, 6 फरवरी 2019

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निर्वाचन विभाग

अधिसूचना

4 फरवरी 2019

सं० एम-01-001/2019-06— निर्वाचन अर्जी संख्या- 06/2015 से संबंधित भारत निर्वाचन आयोग, नई दिल्ली की अधिसूचना संख्या-82/BR-LA/EP(06/2015)ES-1/2018 दिनांक 24.12.2018 सर्वसाधारण की जानकारी के लिए प्रकाशित की जाती है।

बिहार-राज्यपाल के आदेश से,  
प्रवीण कुमार गुप्ता,  
संयुक्त मुख्य निर्वाचन पदाधिकारी ।

## भारत निर्वाचन आयोग

## अधिसूचना

निर्वाचन सदन, अशोक रोड नई दिल्ली-110001, तारीख:-24 दिसम्बर, 2018/ 3 (पौष), 1940 (शक)

सं० 82/BR-LA/EP/(06/2015)/ES-1/2018: लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106(ख) के अनुसरण में, निर्वाचन आयोग एतद्वारा निर्वाचन अर्जी सं०-06/2015 में दिये गये उच्च न्यायालय, पटना के तारीख 28/06/2018 के आदेश को प्रकाशित करता है।

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Election Petition No.6 of 2015**

Asha Devi wife of Sri Surendra Singh Resident of Village, P.O. and P.S. Krishnagarh,  
 District- Bhojpur at Ara .....  
 Election Petitioner/s Versus  
 Saroj Yadav @ Saroj Kumar, Son of Sri Rama Shankar Yadav, Resident of village- Keshopur,  
 P.O. and P.S. Barhara, District- Bhojpur at Ara  
 ..... Respondent/s

**Appearance :**

For the Petitioner/s : Mr. S.B.K Manglam, Adv.  
 : Mrs. Anita Kumari, Adv.  
 For the Respondent/s : Mr. P.K Verma, Sr. Adv.  
 : Mr. Suman Kumar Jha, Adv.

**CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN**  
**C.A.V JUDGMENT**

**Date: 28.06.2018**

The election petition filed under Section 80A and 81 of the Representation of People Act, 1951 (hereinafter referred to as 'the R.P. Act') questions the election of the sole respondent as Member, Bihar Legislative Assembly from 193, Barhara Assembly Constituency in the district of Bhojpur in the election held on 28.10.2015.

The pleadings on record shows that as per the notification issued by the Returning Officer – cum- Additional Collector, Bhojpur at Ara, the programme for election was notified as follows:

Last date for filing of nomination paper	: 08.10.2015
Date of Scrutiny of nomination paper	: 09.10.2015
Date for withdrawal of nomination paper	: 12.10.2015
Date of poll, in case of contested election	: 28.10.2015
Date of counting	: 08.11.2015
Date of declaration of result	: 08.11.2015

The election petitioner, the sole respondent and several others filed their nomination before the Returning Officer. The nomination filed by all 12 candidates was found valid by the Returning Officer and a list of the contesting candidates was published on 12.10.2015. The name of these candidates finds mention at paragraph 7 of the election petition. While the election petitioner contested the election on a ticket of the Bhartiya Janta Party (hereinafter referred to as the 'BJP'), the respondent contested the election as a candidate of the Rashtriya Janta Dal ( hereinafter referred to as the 'RJD'). The election was held on 28.10.2015, the counting of votes was carried out on 08.11.2015 and the respondent was declared elected by the Returning Officer having secured 65001 valid votes as against 51693 valid votes secured by the election petitioner. The sole respondent was thus declared elected by a margin of 13,308 votes. It is feeling aggrieved by the election of the sole respondent that the present election petition has been filed.

The pleadings in the election petition would reflect that the challenge is resting primarily on grounds that the sole respondent was a registered Government contractor and there was a contract subsisting in his name on the date of his election.

It is the case of the election petitioner that the sole respondent is the proprietor of M/s Ujjawal Enterprises which firm was registered as a Class II contractor with the Rural Works Department bearing registration No. (RWD) -1995/2011 issued on 04.01.2011. It is also the case of the election petitioner that the sole respondent signed a contract with the Executive Engineer, Local Area Engineering Organization (hereinafter referred to as the 'LAEO') Work Division II, Jagdishpur (Bhojpur) for execution of contract for construction of Panchayat Sarkar Bhawan for Belauti Panchayat under Shahpur Block in the district of Bhojpur. It is mentioned that a work order was issued in favour of M/s Ujjawal Enterprises vide letter No. 36 dated 14.01.2015 by the Executive Engineer and the firm was directed to complete the contract by 13.01.2016. According to the election petitioner, it is while this contract was subsisting for its completion on 13.01.2016 that not only the nomination was filed by the sole respondent on 16.10.2015 but even the election result was declared on 08.11.2015. According to the petitioner, the sole respondent stands disqualified under Rule 9A of 'the R.P Act' read along side Article 191(1) (a) of the Constitution of India because the contract awarded to the firm of the sole respondent was subsisting not only on the date on which the sole respondent filed his nomination but even on the date of declaration of the result.

The sole respondent has appeared through counsel and has filed his written statement denying all assertions made in the election petition to submit that the contract in between the state and the sole respondent was not subsisting rather stood severed much prior to the filing of the nomination in October, 2015. While raising issues on the maintainability of the election petition itself, it is stated that no contract was subsisting to attract the provisions of Section 9A of 'the RP Act'. According to the sole respondent, the registration of M/s Ujjawal Enterprises as Class II contractor was cancelled on 03.02.2015 by the Rural Works Department and had not been renewed. It is further stated that the work on the project had been stopped in March 2015, much prior to the filing of nomination and thus no contract was subsisting on the date of nomination. It is taking note of the issues proposed by the contesting parties that vide order passed on 19.09.2016 the following issues were framed for adjudication of the dispute:

- (i) Whether the election petition is not maintainable and fit to be dismissed summarily under Section 86 of the Representation of People Act, 1951 ( for short 'the Act') for non- compliance of Section 81 of the Act?
- (ii) Whether the election petition does not contain a concise statement of material facts and hence fit to be dismissed for non-compliance of the provisions under Section 83(1)(a) read with Section 86 of the Act?
- (iii) Whether the pleadings in the election petition are vague, frivolous and scandalous and did not make out a triable issue under the provisions of Section 100(1) of the Act?
- (iv) Whether in view of subsisting contract in the name of sole respondent on the date of his election, the sole respondent was disqualified to contest the impugned election in view of the provisions contained under Section 9(A) of the Act?
- (v) Whether the election of the sole respondent is fit to be declared void on the ground that on the date of his election, he was disqualified to contest the said election under Section 9(A) of the Act?'

The election petitioner has examined the following witnesses in support of the election petition:

- (i) P.W. 1 is the election petitioner Asha Devi.
- (ii) P.W.2 is Awadhesh Kumar Singh, a social worker, associated with the BJP.
- (iii) P.W. 3 is Awadh Kumar Singh, the Executive Engineer, LAEO, Work Division II, Jagdishpur, Bhojpur

The following documentary evidence was led by the election petitioner:

- (i) Ext. 1 is the signature of the Awadhesh Kumar Singh on the application filed under the Right to Information Act.

- (ii) Ext. 2 is the application filed by Awadhesh Kumar Singh (P.W.2) under the RTI Act seeking information.
- (iii) Ext. 3 is a letter No. 849 dated 05.12.2015 issued by the Executive Engineer, LAEO, Work Division II, Jagdishpur addressed to P.W.2, Awadhesh Kumar Singh.
- (iv) Ext. 4 is the original letter No. 849 dated 05.12.2015 produced by the learned counsel for the election petitioner.
- (v) Ext. 5 is a letter No. 36 dated 14.01.2015 containing work order issued by the Department in favour of M/s Ujjawal Enterprises.
- (vi) Ext. 6 is the agreement between the Department and M/s Ujjawal Enterprises proprietor Saroj Yadav.
- (vii) Ext. 7 is the letter No. 382 dated 05.07.2016 through which documents were forwarded to this Court.
- (viii) Ext. 8 series are the affidavits of sole respondent Saroj Yadav @ Saroj Kumar.
- (ix) Ext. 9 is the letter dated 03.10.2015 written by the sole respondent Saroj Yadav for closure of the contract.
- (x) Ext. 10 is the letter No. 287 dated 09.04.2016 issued by the Executive Engineer.
- (xi) Ext. 11 is the letter No. 479 dated 25.08.2016 through which documents were forwarded to this Court.
- (xii) Ext. 12 is the measurement book for the Belauti Panchayat Sarkar Bhawan.
- (xiii) Ext. 13 is letter No. 80 dated 25.01.2016 of the Executive Engineer addressed to the Chief Engineer, LAEO.
- (xiv) Ext. 14 is the letter No. 912 dated 31.12.2015 written by the Executive Engineer to the Chief Engineer.
- (xv) Ext. 15 is the letter dated 17.01.2011 of the Rural Works Department, Bihar, Patna regarding registration certificate of the sole respondent which was valid for 5 years (14.01.2011 to 13.01.2016).
- (xvi) A letter bearing No. 849 dated 05.12.2015 received by P.W.2 Awadhesh kumar Singh under the RTI Act has been marked 'X' for identification.

The sole respondent examined the following witnesses in support:

- (i) R.W.1 is Ram Dahin Rai, a Rajmistri who had worked on the Panchayat Sarkar Bhawan.
- (ii) R.W.2 is Rakesh Kumar who was employed as Munsi by the sole respondent Saroj Yadav for supervising the construction work.
- (iii) R.W.3 is Ram Darshan Yadav @ Guddu Yadav an agriculturist, who claims to have been employed by the sole respondent Saroj Yadav for looking after the construction work.
- (iv) R.W.4 is Kamalesh Chaudhary, the Chief Engineer III, Rural Works Department.
- (v) R.W.5 is Bidu Bhushan Prasad, Director, Department of Information and Public Relation.
- (vi) R.W.6 is Dharma Dev Chaudhary, the Engineer in Chief cum Additional Commissioner cum Special Secretary, Rural Works Department, Government of Bihar, since retired on 31.03.2015.
- (vii) R.W.7 is Md. Hussain Alam, the Junior Engineer, LAEO, Work Division II, Jagdishpur.
- (viii) R.W.8 is the sole respondent Saroj Yadav @ Saroj Kumar himself.

A part from the oral evidence, the sole respondent has also led the following documentary evidence:

- (i) Ext. A series is the progress report of the contract work.
- (ii) Ext. B is the letter No.167 dated 22.01.2016 of the Chief Engineer written to the Executive Engineer.
- (iii) Ext. C is letter No. 492 dated 02.03.2016 of the Chief Engineer issuing direction to cancel the contract.

- (iv) Ext. D is letter dated 26.11.2014 of the Engineer in Chief addressed to the Director, Information and Public Relation regarding publication of notice for online registration.
- (v) Ext. E is public notice by the Rural Works Department, Patna for online registration by the existing contractors as well as new entrance.
- (vi) Ext. F is letter dated 28.01.2016 of the Engineer in Chief, Rural Works Department, Bihar, Patna regarding cancellation of the registration of the sole respondent Saroj Yadav.
- (vii) Ext. G is the letter No. 282 dated 23.03.2017 of the information and Public Relation Department whereby documents had been forwarded to this Court.
- (viii) Ext. H series are advertisements published in Dainik Jagaran, Times of India and Prabhat Khabar in respect of enrollment of contractors.
- (ix) Ext. I series are advertisements published in Dainik Jagaran, Prabhat Khabar and Farukhi Tanzim for online registration of contractors.
- (x) Ext. J series is newspaper publications.
- (xi) Ext. K is the affidavit portion of the notice
- (xii) Ext. K/1 is verification of the notice.
- (xiii) Ext. L is the letter dated 03.10.2015 of the petitioner bearing receipt given by the Peon in the office of the Executive Engineer, LAEO.

All exhibits have been marked without objection of the other side except Annexure-K series.

The arguments was initiated by Mr. Prabhat Kumar Verma, learned Senior counsel appearing for the sole respondent.

In reference to the pleadings in the election petition more particularly paragraph 16 onwards, he submits that the election of the sole respondent is primarily challenged on two grounds namely:

- (a) The contract entered in between the sole respondent and the State Government was subsisting on the date of filing of the nomination; and
- (b) The petitioner had given an incorrect declaration about his accommodation as well as his occupation and his wife's occupation against the queries made in paragraph 9 of the affidavit in Form 26 which is a part of the nomination form.

Contesting the allegation of false declaration, learned counsel made reference to Section 33A of 'the R.P. Act' to submit that the provisions introduced vide Amendments Act, 72 of 2002 recognizes the right of the voters to the information relating to the candidate as regarding his involvement in any criminal case exclusively and not anything further. It is argued that the disclosure in a nomination form and a disclosure in Form 26 are distinct and the occupation of the candidate is not a relevant factor for unsuiting him in view of the intendment present in Section 33A. He further submits that the relevant disclosures to be given in Form 26, finds discussed only in Section 33A and nowhere else in the statute.

Learned counsel next turns to written statement to submit that the presentation of the election petition is not in terms of Section 81(3) inasmuch as the additional copies of the election petition, duly attested, was not filed by the election petitioner which itself was sufficient for dismissal of the election petition under Section 86 of 'the R.P. Act'.

Learned counsel has made reference to the order dated 19.09.2016 whereby the issues were framed, to canvass that issue no.

(i) does take note of such objections raised by the sole respondent. He turns to the affidavit portion of the additional copy to submit that it is not the same as the original and thus cannot be called a true copy of its original. According to learned counsel since the signature of the Oath Commissioner is missing in the additional copy, it cannot be called a true copy of its original.

Learned counsel has taken this Court through the different paragraphs of the written statement to submit that the registration of the firm of which the sole respondent was the proprietor, ceased to operate and the work was stopped much prior to the filing of the nomination.

According to learned counsel, the registration of the firm itself was cancelled on 03.02.2015. He refers to the statement made in paragraph 10 of the written statement to submit that a departmental notification was issued by the Rural Works Department informing the registered contractors to make fresh enrollment on or before 03.02.2015 and upload the same otherwise their registration shall stand cancelled. In support, learned counsel has made reference to Ext. D which is the notice of the Rural Works Department to such effect. Learned counsel has referred to Ext. F which is letter dated 28.01.2016 of the Engineer in Chief addressed to the sole respondent informing him about the cancellation of his registration with effect from 03.02.2015. It is thus argued that where the registration of the sole respondent itself was cancelled on 03.02.2015 and information to such effect was given albeit on 28.01.2016, it would be a confirmation of the position that the contract was not subsisting on the date of filing of the nomination.

Learned counsel has referred to Ext.6 which is the agreement entered in between the parties and is in the name of the firm M/s Ujjawal Enterprises, not the sole respondent. In reference to Ext. 3 which is the letter dated 05.12.2015 of the Executive Engineer he informs that the nature of the contract as well as its duration stands discussed. It is argued that due intimation was given by the sole respondent on 03.10.2015 to the Executive Engineer, Rural Works Department that the firm was no longer interested to pursue the contract and hence the same be closed and the outstanding bill be paid. In support, learned counsel has referred to Ext. L which is a letter of the sole respondent addressed to the Executive Engineer, LAEO, Work Division II and bears receipt dated 03.10.2015. Learned counsel in reference to the objection present at paragraph 17 of the written statement has submitted that at no stage of the election process did the election petitioner raise any objection against the candidature of the sole respondent either at the stage of filing of the nomination or at the stage of scrutiny but having lost the contest that the issue of disqualification is being raised which should have been raised at the very threshold or within a reasonable time.

Turning to the main issue raised in the election petition as regarding the alleged disqualification of the sole respondent under Section 9A of 'the R.P. Act', learned counsel has referred to the statutory provisions underlying Section 9A of 'the R.P. Act' to submit that a disqualification of such nature is only in a condition where 'their subsists a contract' entered by a candidate with the appropriate Government for supply of goods or for execution of any work. According to learned counsel, it is only so long that a 'contract subsists', which would render a candidate disqualified and not in any other circumstance. According to Mr. Verma, where the contract is brought to an end by a positive act or the conduct of the parties, even if the same would constitute a breach, yet it would mean that the contract has ended. According to learned counsel, the failure of the sole respondent to upload his registration in compliance with the notice at Ext. D which inter alia stipulated for cancellation of registration on the failure of the contractor concerned to upload his registration on or before 03.02.2015 coupled with the fact that no construction work was carried out since after March, 2015 which two aspects are of a period much prior to the initiation of the election process, the contract had come to an end and thus the plea raised under Section 9A of 'the R.P. Act' lacked foundation.

Learned counsel has referred to the evidence of the election petitioner as P.W.1 to submit that she accepts her presence during scrutiny and also accepts knowledge about the sole respondent engaged in contractual work yet did not choose to raise any objection during the nomination or during scrutiny. He also refers to the evidence given by the Awadhesh Kumar Singh as P.W.2 to submit that he admits lack of knowledge on the progress in the construction of Panchayat Sarkar Bhawan since March 2015. It is argued that the evidence is hearsay and there is nothing in the evidence of these two witnesses which would make out a case for disqualification of the sole respondent. It is argued that there is no bona fide or reliability in the evidence of the P.W.2 who himself is an agent and has brought nothing on record to confirm the allegation.

Mr. Verma has next referred to the evidence of the Executive Engineer, Awadh Kumar Singh as P.W.3 to submit that he acknowledges that a request was made by the sole respondent on 03.10.2015 for closure of contract and also identifies the letter marked Ext.9 which letter according

to the witness was docketed on 31.12.2015 bearing diary No.166. In reference to the statement of the said witness during his cross examination, he submits that it was well accepted that no work was carried out since after 19.03.2015. In reference to the witnesses" examined on behalf of the sole respondent he submits that Ram Dahin Rai and Rakesh Kumar examined as R.W.1 and R.W.2 respectively have given evidence on the start as well as the closure of work in March, 2015. In reference to the evidence of Ram Darshan Yadav as R.W.3 he submits that even this witness confirms closure during Holi festival which falls in March, 2015. Learned counsel has referred to the evidence of the Chief Engineer examined as R.W.4 to submit that evidence has come that the last date for receiving online application for registration by the existing contractor was fixed on 03.02.2015 and though, it was extended 3 times, it expired on 03.09.2015. He submits that the witness has admitted that vide letter dated 28.01.2016, the sole respondent was intimated about the cancellation of his registration with effect from 03.02.2015. According to Mr. Verma, the sole respondent by his conduct of abandoning the work & failure to upload registration, had made it well known that the contract was not subsisting and which action is confirmed by his follow up application for closure of the contract. It is argued in reference to the evidence of the Chief Engineer P.W.4 that though the date for uploading the registration was extended until 30.09.2015, yet the respondent did not comply. Meaning thereby, if not earlier, then at least w.e.f 30.09.2015, the registration of the firm stood cancelled.

In reference to the evidence of R.W.5 Bidu Bhushan Prasad, the Director, Department of Information and Public Relation, he submits that the publication of the notice in 3 Newspaper vide Annexure H series has been endorsed by him which put the contractors on notice for uploading their registration on or before 03.02.2015 failing which the registration would stand cancelled. He refers to the evidence of R.W. 6 Dharam Dev Chaudhary, the Engineer In Chief cum Additional Commissioner cum Special Secretary who deposed that a registration for a contractor is compulsory, meaning thereby, that if the sole respondent failed to upload his application for registration within the time stipulated in the notice, it stood cancelled and whereafter the sole respondent could not have carried out the contractual work.

According to Mr. Verma, there is a mark difference between rescinding of a contract and which is by a positive order in comparison to a situation reflecting that the contract was not subsisting. According to Mr. Verma, even if a contract had not been rescinded, the action of the parties to an ongoing contract itself would indicate whether or not, the contract subsists between them. Learned counsel has referred to the evidence of R.W.7 Md. Hussain Alam, the Junior Engineer to submit that he has admitted that no work was carried out after 18.03.2015. Mr. Verma, has finally referred to the evidence of the election petitioner who deposed as P.W.1 to submit that no objection was raised on the candidature of the sole respondent either during presentation of the nomination or during scrutiny or even during counting process. He submits that the husband of the election petitioner in fact congratulated the sole respondent on his success. It is submitted that sole respondent has deposed that the copy of the election petition so received by him on notice neither contains the name of the authority before whom the affidavit was sworn nor the name of the verifier is present in the verification portion. According to Mr. Verma this lacunae renders the election petition itself defective for its dismissal under Section 86. It is submitted that the respondent has deposed on the intimation on closure given by him on 03.10.2015 vide Ext.9 and Ext. L which also bears the diary entry as well as the receiving date respectively. It is argued that the witnesses have identified the order dated 09.04.2016 marked Ext. 10 as the order passed on his application filed for closure of the contract. In reference to the evidence of the sole respondent during his cross examination, it is argued that it has been accepted by the sole respondent that he is a first timer in the civil contract work and that since his wife as a Zila Parishad Member was not drawing salary or honorarium that he had mentioned her as a house wife. It has further been deposed by the sole respondent that though Ext.9 and Ext L are the copies of the same document but the receiving is present on Ext. L. It is the argument of Mr. Verma that since the election petitioner has not contested the veracity of the Ext. L which has also been enclosed as Annexure R/3 to the written statement, the receiving present thereon cannot be doubted. It is argued that

while Ext. R/L mentions the date of receiving of the request made by the sole respondent on 03.10.2015, the remarks on Ext. 9 mentions the diary number and the date on which the letter was docketed.

In sum and substance, it is the argument of Mr. Verma that the word 'subsists' as it occurs in Section 9A has to be tested in the background of the circumstances existing in any contract and in such of the cases where parties stopped working or fail to renew his registration this conduct itself would bring the contract to an end and in such cases a contract cannot be termed as 'subsisting'. According to Mr. Verma even if such action would amount to a breach of contractual obligation and even if a possible consequence thereof would be a rescinding of a contract but this again goes to prove that the contract was not subsisting.

Learned counsel in support has relied upon a judgment of the Supreme Court reported in **AIR 1984 SC 988 (Smt. Aslhing versus L.S. John)** to submit that a similar situation arising in the said case, the Supreme Court held that the conduct of the contractor confirmed that the contract was not subsisting. He submits that the failure of the sole respondent to comply with the notice to upload his registration application confirmed that he was no more interested in continuation with contractorship. According to Mr. Verma the act of abandoning the project since after March, 2015 is a conclusive confirmation of his intent of closure of the contract. It is argued that the very fact that an application was filed by the sole respondent on 03.10.2015 much prior to the filing of the nomination confirms the sequence. Learned counsel has referred to the judgment of the Supreme Court reported in

**AIR 1981 SC 1177 (S.Munishamappa Versus B.Venkatarayappa)** to submit that the intent of Section 9A has been discussed and the opinion at paragraphs 16, 17 and 18 supports the case of the petitioner. To the same effect learned counsel has relied upon a judgment of the Supreme Court reported in **AIR 1976 SC 2130 (Jugal Kishore Patnayak versus Ratnakar) paragraphs 12, 13 and 14**. Per contra, it is the argument of Mr. S.B.K. Mangalam learned counsel appearing for the election petitioner that the entire issue revolves around the letter dated 03.10.2015 of the sole respondent marked as Ext.9 and Ext. L which though is dated 03.10.2015 but whether it was received on 03.10.2015 or was received on 31.12.2015 would be the relevant issue. According to Mr. Mangalam, since the docket No. 166 is dated 31.12.2015, presumption lies that the letter was handed over only on 31.12.2015. He submits that even if much has been canvassed on behalf of the sole respondent that he abandoned the project since after March, 2015 but there is nothing on the record to support that any attempt was made by the sole respondent to inform the department about his intention until 03.10.2015 or 31.12.2015 as the case may be. Distinguishing the judgment in the case of Aslhing (supra) he submits that in the case put for consideration before the Supreme Court there is no dispute as regarding the filing of the letter by the contractor evincing his intent not to carry out the contract but this relevant aspect is debatable in the present case and would be governed by the material present in Ext. 9 and Ext. L. According to Mr. Mangalam, the receiving dated 31.12.2015 appears more reasonable as it is after filing of the election petition and perhaps on receipt of notice. It is the argument of Mr. Mangalam that though Ext. L bears a receiving of 03.10.2015 but neither there is any statement in the written statement as to who has received the application nor has the receiver been examined in the proceeding. In support he makes reference to the statement made in paragraphs 9 and 14 of the written statement.

Turning to the evidence of RW 8 i.e the sole respondent he submits, that the evidence of the sole respondent fails on the absence of mentioning of the dates in the measurement book which creates a doubt whether or not, the work was in fact stopped in March. It is argued that there is nothing on record which supports the claim of the petitioner that the work was stopped since after March, 2015 nor there is any report of the departmental authority in this regard. He submits that the name of recipient of the letter is not mentioned either in the written statement or has been disclosed in the deposition and there is no system prevailing in the Government where the applications are received by a Peon. It is the argument of Mr. Mangalam that burden of proof lies on the party having special information about the matter in terms of Section 106 of the



Evidence Act and since it is the case of the sole respondent that he handed over his application to a Peon, the onus lay on the sole respondent to disclose his name and/or to examine him.

Referring to Ext. 2 which is the application of P.W 2 Awdhesh Kumar Singh under the RTI Act seeking information on the agency entrusted with the construction work of Panchayat Sarkar Bhawan, he submits that the information so asked was provided vide letter No. 849 dated 05.12.2015 marked as Ext. 3 and which clearly mentions the time of completion of the project as 13.01.2016. He argues that the information was given on 05.12.2015 which means that the contract was subsisting on the date.

It is the argument of Mr. Mangalam that although the Executive Engineer concerned was examined as P.W 3 but no questions were put on the receiving of the application. It is submitted that while most witnesses have deposed that the construction work was carried out until the lintel level, Ext. A series would confirm that as until 01.05.2015 the construction work was done up to the plinth level. He further submits that the progress report Ext. A series also confirms that brick work was going on since after 02.06.2015 until 01.10.2015 when it was stopped. According to Mr. Mangalam, the evidence at Annexure A series itself falsifies the evidence of the witnesses examined by the sole respondent who have deposed that no construction work was carried out after March, 2015.

Learned counsel has next turned to the evidence of the Chief Engineer as R.W. 4 to submit that while according to the sole respondent his registration got automatically cancelled by his failure to upload his online application pursuant to the notice so published by the Department, the Chief Engineer has stated that the sole respondent had filed his application for cancellation of registration only in 2016 and that there was no automatic cancellation of the contract on non uploading of the registration application. Learned counsel has taken this Court through the evidence of the Engineer In Chief as R.W. 6 to state that there was no automatic cancellation of contract on the cancellation of registration of any contractor. Referring to the evidence of R.W. 7 Md. Hussain Alam, the Junior Engineer it is submitted that the witness had accepted that no communication was received from the contractor regarding stoppage of work from 15.03.2015 or that he had left the construction work. It is argued that where the evidence on record shows that the work continued until 01.10.2015, the failure of the sole respondent to examine the receiver of Ext. L or have his signature identified by any of the official witness, comments on the veracity of the document. According to Mr. Mangalam while Ext. L is a document generated to save the respondent, Ext. 9 is the authentic document and confirms that intimation was given by the sole respondent only on 31.12.2015. According to Mr. Mangalam, the receiving on Ext. L has been generated by ante dating the same and which is confirmed when tested against Ext. 9 and corroborated through letter No. 849 dated 05.12.2015 marked Ext. 4 whereby P.W. 2 Awadhesh Kumar Singh was given information about the delay in the contract. According to Mr. Mangalam, Ext. 4 itself confirms that no application had been received by the Department until the said date because if any such information was in possession of the Executive Engineer, the same would have been mentioned in the information so given. According to Mr. Mangalam, it is for the first time that an application dated 03.10.2015 was received by the Executive Engineer on 31.12.2015 and whereafter proceeding was initiated for termination of the contract vide Ext. 14 when the Executive Engineer sought guidelines from the Chief Engineer in reference to the request present in the letter of the sole respondent dated 03.10.2015 which was received in the office of the Chief Engineer on 15.01.2016. Turning to Ext. A series again, he argues that though evidence was led that work was stopped in Holi, in March, 2015 but the evidence on record shows that the work continued until 01.10.2015. Learned counsel has referred to a judgment of the Supreme Court reported in **(2002) 8 SCC 467 (Rajsekhar Basavaraj Patel vs. Subhash Kallur & Ors)** and in reference to the opinion expressed at paragraph 23 he submits that in a similar situation prevailing in the said case, the receiving canvassed was rejected by the Supreme Court. Learned counsel has referred to another Judgment of **the Supreme Court reported in 2004 (1) PLJR (SC) 261 (Sushil Kumar versus Rakesh Kumar)** and in reference to paragraph 9 of the judgment it is submitted that the burden of proof to establish the receiving lies on the sole respondent. Concluding his argument it is submitted

by Mr. Mangalam that there is no substantive piece of evidence confirming the closure of contract prior to the filing of the nomination by the sole respondent and the evidence whatsoever relied upon together with case laws relied upon by Mr. Verma, is not sufficient enough to support the claim of the sole respondent.

By way rejoinder Mr. Verma has turned to Ext. 9 and Ext. L to submit that each of these document have been marked without objection and thus once the veracity of the document has not been questioned, the contents present therein cannot be questioned on veracity. It the submission of Mr. Verma that the very fact that action was initiated on the application of the sole respondent dated 03.10.2015 for closure of the contract, it certainly cannot be called a fabricated document.

According to Mr. Verma, though objections are raised on the receiving dated 03.10.2015 but no evidence was led by the election petitioner to such effect. It is submitted that while each of the official witness have agreed to the submission of the application dated 03.10.2015 by the sole respondent, once this is accepted then and nothing was left to demonstrate that the said application was in time nor there is any scope for raising any doubt. Learned counsel in reference to Ext. 10 which is the letter of cancellation issued by the Executive Engineer bearing No. 287 dated 09.04.2016 submits that it is on the application dated 03.10.2015 of the sole respondent that the contract was cancelled and which letter also clearly mentions that on receipt of such application, the final measurement was taken on 04.10.2015 which is much prior to the filing of the nomination by the sole respondent. It is submitted that similar is the situation at Annexure 12 which is the measurement book and records final measurement on 04.10.2015 on the closure application dated 03.10.2015.

According to Mr. Verma, it is only on account of the different dates occurring in Ext. 9 and Ext. L which has given a reason to the election petitioner to raise doubts on the intent of closure shown by the sole respondent. It is submitted that the doubt so raised needs to be tested along side the accompanying facts which are relevant for adjudication. In reference to Ext. 13 which is the letter dated 25.01.2016 of the Executive Engineer addressed to the Chief Engineer, he submits that the specific details present therein would confirm that work was stopped much prior to the filing of the application on 03.10.2015 and whereafter measurement was carried out and the amount payable was quantified.

Reverting to the evidence of R.W. 4 Kamlesh Chaudhary the Chief Engineer along side the advertisement/newspaper publications led as Exts. H, I and J , it is argued that the last date mentioned for uploading the application for registration was 03.09.2015 and the very fact that the petitioner never uploaded his application was sufficient indication that he had no interest in continuing with the contract work.

In response to the progress report at Annexure-A series relied upon by Mr. Mangalam to canvass that the work continued until October, learned counsel relied upon Ext. 12 i.e the measurement book to state that though it takes note of the progress of work until 18.03.2015 but thereafter it records no progress rather closes the measurement on 04.10.2015 which is sufficient to prove that no work was carried out in between 18.03.2015 to 04.10.2015.

Rebutting the argument of Mr. Mangalam in shifting the onus in reference to Section 106 of the Evidence Act, it is submitted by Mr. Verma that once the allegation is supported with cogent materials, the onus reverts to the party making such allegation. Learned counsel has relied upon following judgments of the Supreme Court:

- (1) (1975) 4 SCC 862 ( Moti Lal versus Chandra Pratap Tiwari & Ors.),
- (2) AIR 1968 SC 929 (Laxman Siddappa versus K. Chaniappa)
- (3) 1985 Spl. SCC 111 (Umed Singh Raw versus Mani Ram Godara) and page 179 (Leela Kishan versus Mani Ram Godara)

Learned counsel with reference to the judgment of the Supreme Court reported in AIR 2010 SC 905 (P.C Thomas versus P.N Ismail) submits that once a material evidence have been marked exhibit they cannot be charged on forgery.

I have learned counsel for the parties and I have perused the records.

Although exhaustive arguments have been advanced by either side but the core issue which would determine the fate of the present contest is, whether or not the contract entered in between the sole respondent and the appropriate Government, was subsisting on the date of filing of the nomination.

Of the issues so framed by this Court on 19.09.2016, while issue No. (I), (II) and (III) relate to the maintainability of the election petition, raised by the sole respondent through his written statement, issue No. (IV) and (V) raises issue of disqualification of the sole respondent in reference to the provisions underlying Section 9A of 'the R.P. Act'.

**Issue Nos. I, II and III:**

Since these three issues raise questions on the maintainability of the election petition itself that they have been taken up together. Surprisingly even though the sole respondent has raised issues of maintainability of the election petition inter alia on grounds of failing to satisfy the statutory provisions underlying Section 81, 83 (1) (a) and Section 100 (1) of 'the R.P. Act' and on grounds that the pleadings are vague, frivolous and scandalous but in my opinion the objections are ornamental and have been taken in a routine opposition of the contest because no such infirmity can be found present in the election petition. Despite reliance placed on Section 81(3) of 'the R.P. Act', no evidence was led to demonstrate any deviation in pleadings present in the Court copy from the one served on the respondent. Simply because the Oath Commissioner signature/seal or verifier's signature was not present in the notice issued, would, in my opinion, not render it defective because it is the pleadings on record which would be relevant consideration for such objection and not any procedural defect.

Even the allegation of vagueness of the pleadings or its scandalous character are not supported from record rather are bald assertions.

In the circumstances noticed, in my opinion the objections raised by respondent on the maintainability of the election petition, is ornamental, taken in a routine manner, lacking in seriousness and are thus only taken for their rejection.

Issues No. I, II and III are accordingly decided in favour of the election petitioner.

**Issue Nos. IV & V:**

I would now proceed to consider issue No. IV and V which go to the root of the matter and is the foundation for the contest herein. According to Mr. Verma, it is not correct to say that unless a contract is rescinded, it shall deem to be subsisting. According to him whether a contract is subsisting, is to be determined on the basis of the facts and circumstances accompanying the situation as well as the conduct of the parties thereto. Per Contra, it is the submission of the Mr. Mangalam that a closure to a contract has to be by a positive action.

In so far as the case in hand is concerned, the contract in between the sole respondent and the appropriate Government was rescinded vide office order bearing No. 2 dated 09.04.2016 marked Exhibit 10 whereby the contract in between the parties bearing No. 73F2/ 2014-15 was cancelled. While according to Mr. Verma there are sufficient materials on record of the pleadings to demonstrate the intent of the sole respondent to a closure of the contract, according to Mr. Mangalam, the documents have been generated after the election of the sole respondent with the sole intention of escaping disqualification staring under Section 9A of 'the R.P. Act'. I have already discussed the evidence relied upon by the contesting parties in support of their respective submissions in extenso but concentrating on the issue of disqualification I deem it proper to deal with the same again before recording my opinion thereon.

Exhibit 6 is the contract entered in between the sole respondent on one hand and the Executive Engineer, 'LAEO' Work Division II on behalf of the appropriate Government, on the other hand dated 14.01.2015 and according whereto the work of construction of the Panchayat Sarkar Bhawan was to be completed until 13.01.2016. Since the award of contract is not put to question, I do not deem it necessary to deal with other evidence relatable thereto.

The next relevant document is Ext. 9 which is a letter dated 03.10.2015 written by the sole respondent addressed to the Executive Engineer 'LAEO' Work Division II intimating him that he is not interested in executing the work and thus step be taken for closure of the contract and for

making payment of the amount admissible to him. This letter bears a receiving No. 166 dated 31.12.2015. A photo copy of the letter has been led by the sole respondent as Exhibit L and this bears a receiving which is dated 30.10.2015.

The measurement Book has been marked as Ext. 12 and records that the work was executed until 18.03.2015 but thereafter there is no recording except for the final measurement done on 04.10.2015 in presence of the sole respondent.

Ext. 14 is the letter No. 912 dated 31.12.2015 of the Executive Engineer, 'LAEO' addressed to the Chief Engineer seeking guidelines on the letter dated 03.10.2015 of the sole respondent as proprietor of M/s Ujjawal Enterprises for closure of the contract.

Ext. 13 is the letter of the Executive Engineer, LAEO to the Chief Engineer bearing No. 80 dated 25.01.2016 whereby in reference to the application of the sole respondent dated 03.10.2016, it is intimated that the sole respondent was not interested in the work and on his application the final measurements have been carried out, hence orders may be issued for closure of the contract.

Ext. B is the letter bearing No. 167 dated 22.01.2016 of the Chief Engineer addressed to the Executive Engineer, LAEO Work Division II, Jagdishpur to submit his report as to the current status to the matter.

Ext. C is the second letter of the Chief Engineer bearing No. 492 dated 02.03.2016 addressed to the Executive Engineer, LAEO issuing direction for cancellation of the contract.

Ext. 10 is the order of cancellation issued by the Executive Engineer bearing letter No. 287 dated 09.04.2016.

Annexure A series is the progress report of the contract work which was relied upon by Mr. Mangalam to canvass the continuation of work until 01.10.2015.

Ext. H, I and J series are notices/advertisements intimating the contractors for uploading their application online for registration failing which the same would be cancelled. While initially the date for such uploading was fixed as until 03.02.2015 as manifest from Ext. H series but this was extended vide Ext. I and vide Ext. J the last date extended was until 30.09.2015. There is no dispute that despite the public notice/advertisement at Exhibits H, I and J series, the sole respondent never bothered to upload his application for online registration as contractor and the effect of which would be, that if not earlier but surely with effect from 30.09.2015, his registration as contractor stood cancelled. There can be no contest on the consequences of non uploading of the online application for registration as directed in the notices and thus there can be no dispute that the registration of the sole respondent at Ext. 15 which was otherwise valid until 13.01.2016, stood cancelled by his failure to comply with the notice/ advertisement at Ext. H, I and J at least with effect from 30.09.2015 if not earlier. In other words the sole respondent lost his status as a registered contractor by his conduct and on his failure to upload his registration application. In my opinion this aspect alone is sufficient to conclude that the contract was no more subsisting in between the sole respondent and the government on his loss of status as a registered contractor, at least since after 30.09.2015 which is much prior to the filing of the nomination on 08.10.2015. The other aspect of the matter is the conduct of the sole respondent in practically abandoning the project since after 18.03.2015 as it stands confirmed from the measurement book which does not record any construction since after 18.03.2015. Much reliance has been placed by Mr. Mangalam to the progress report at Ext A series to canvass that the work continued until 01.10.2015 but a cursory glance to the progress report of the contract work at Ext.-A series would confirm that it merely reported the status of the matter and not the stage of construction. The report on the status of the project at Ext 'A' series does not give any indication of the stage of the project. While in April, 2015, the report simply mentions that the work was completed until plinth level, thereafter there is no report on the progress except that the term 'brick work' has been mentioned, and in the report for September, 2015, it is mentioned that the work has stopped. Even going by the assertions made by Mr. Mangalam, there is no contest that the construction work ceased in September, 2015 which is much prior to the filing of the nomination. I would now turn to the letter dated 03.10.2015 of the sole respondent which was led as Ext. 9 and Ext. L by the parties. While

Ext. 9 bears a No. 166 dated 31.12.2015, Ext. L bears receiving on 03.10.2015. Each of the two exhibits have been marked without objection.

Mr. Verma is absolutely on safe ground to submit that once this document is marked exhibit without objection, it cannot be questioned on the veracity of its contents nor there is any occasion for the sole respondent to prove its contents. The Executive Engineer concerned has been examined as P.W. 3 by the election petitioner and who admits that the sole respondent had applied for closure of the contract on 3.10.2015 which letter was received in the office and docketed with a diary number. He also admits that though the exact date on which the letter was received is not to his memory but does admit that the letter was docketed with Diary No. 166. He also admits that he was busy with election work prior to 31.12.2015 and that the date of receipt of the letter dated 03.10.2015 is not mentioned. The evidence of the Executive Engineer concerned as P.W. 3 confirms to the filing of the letter dated 03.10.2015 by the sole respondent. Even though Mr. Mangalam has been rather assertive on his argument that the letter is ante dated and has been created for the purpose of saving the election which otherwise stood void under Section 9A of 'the R.P. Act' but neither any evidence was led by Mr. Mangalam on behalf of the election petitioner in support of such allegation or on the ante dating of the document. In fact, the letter of the sole respondent at Ext. 9/L when considered along side the progress report marked Ext. A and the measurement book marked Ext. 12, is an answer to each objection and to every form of allegation on its genuineness.

As I have already observed at the very outset, there is a marked distinction between a circumstance where a contract has been rescinded, which in the present case happened through Ext. 10 on 09.04.2016, as against the circumstance which reflected that the contract was no more subsisting in between proprietor of the firm and the Executive Engineer on behalf of the appropriate Government. The veracity of the entry in the measurement book has not been doubted and which confirms that no construction work was carried out since after 18.3.2015. Ext. A series has been much relied upon by Mr. Mangalam and which again confirms that the construction work was stopped since after September, 2015, if not earlier. My observations are not to be construed as an acceptance of the submission of Mr. Mangalam that work continued after March 2015 because even the progress report at Annexure-A series does not suggest thus. My observations are simply for testing the averments after giving a long rope to the objections raised by the election petitioner to canvass that the contract was subsisting however the allegation is not found supported with the material evidence on record. The judgment of the Supreme Court in the case of **Aslring** (supra) is somewhat similar to the case in hand and taking note of similar objections as raised therein, that the Supreme Court rejected the objection to dismiss the appeal. In the said case a similar objection for disqualification of the respondent was raised under Section 9A of 'the R.P. Act'. Having lost before the High Court that the matter reached the Supreme Court where it was noted that the respondent-winning candidate had written a letter on 03.11.1979 to the Executive Engineer that he was closing the contract. The last date for filing nomination was 10.12.1979. According to the appellantelection petitioner, the contents of the letter did not reflect that the contract had come to an end. The Supreme Court on going through the contents of the letter held thus:

**"After going through the contents of the letter it is absolutely clear that the contractor unilaterally put an end to the contract and informed the Department concerned accordingly and also he had resigned from the contractor's list of PWD Manipur. Thus after this letter the contract came to an end by breach and the contract was no longer subsisting. Mr. Rangarajan has submitted some very nice and delicate questions for consideration. One of them being that until and unless the letter is accepted by the Authority the contract would continue and thus the respondent would suffer from the disqualification. In our opinion having regard to the contents of the letter it is not , possible to accept the argument of Mr. Rangarajan that the contract was subsisting. The acceptance of the letter by the authorities was unnecessary for putting an end to the contract although the breach may give rise to a cause on action for damages....."**

Chapter IV of the Contract Act deals with the 'Performance of Contracts' and section 37 outlines the obligation of the parties to a contract which reads thus:

**"37. Obligations of parties to contracts.-**

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract."

A plain reading of the stipulation manifests that parties to a contract are bound to perform on their respective promises under a contract.

Section 39 of the Contract Act provides for the effect of refusal of a party to perform his promise and reads thus:

**"39. Effect of refusal of party to perform promise wholly.-** When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

I have referred to the provisions underlying section 37 and 39 of the Contract Act to demonstrate that while there is no contest on the obligation of the parties to a contract in performance of their respective promises, where either of the parties to a contract, fails to perform his part, the other would be well within his right to end the contract. A corollary thereto is, that the moment either of the parties to a contract refuses to perform his part of promise, the contract cannot be held to be subsisting rather the default by a party to a contract in performing his part of promise has brought the contract to a closure in so far as his discharge is concerned and whereafter it is upon for the other party to take legal recourse as per the stipulations present in the agreement which would include a rescission of the contract. It can be safely concluded that an order rescinding a contract attaches finally to a situation of non subsistence of contract, on account of default by any of the parties to a contract in performance of his obligation. In short the order rescinding a contract confirms that the contract was not subsisting.

I am persuaded in this connection to observe that there is nothing on the record of the proceeding which would demonstrate that any attempt was made either by the sole respondent to reinitiate construction work on the project which was stopped since after 18.03.2015 or on the part of the department to enforce the contract. That the contract had come to a stand still position, a mere absence of rescission order in no manner would provide strength to the election petitioner to canvass her allegations. In fact even though the election petitioner has deposed that she was aware of the contract allotted to the sole respondent yet she raised no objections at any stage of the election process on the disqualification complained of herein rather it is having lost the contest that the issue has been raised.

The evidence of the officials of the department who have been examined as P.W. 3, Awadh Kishore Singh, Executive Engineer, LAEO; R.W. 4 Kamalesh Chaudhary, Chief Engineer; R.W. 5 Bidu Bhushan Prasad, Director, Department of Information and Public Relation; R.W. 6, Dharam Dev Chaudhary, Engineer In Chief cum Additional Commissioner cum Special Secretary and R.W. 7 Md. Hussain Alam, Junior Engineer, LAEO Work Division II on the issue that neither did the sole respondent bother to upload his application for online registration nor did he continue with the construction work after March, 2015 rather expressed clear indications for closure of the contract through letter dated 03.10.2015 which was acted upon to result in the cancellation of the contract vide order dated 09.04.2016 at Ext. 10, lends conclusive support to the stand of the respondent.

Having considered the issue in the backdrop of the oral and documentary evidence on record, the legal position on the subject, the provisions of the Contract Act and the view expressed by Supreme Court in similar situation, I am persuaded enough to hold that the contract in between sole respondent as proprietor of the firm and the Executive Engineer, LAEO on behalf of the appropriate Government, was not subsisting on the date of filing of the nomination form rather had come to a close by the conduct of the sole respondent as it stands supported by the evidence

on record. The issue thus raised by the election petitioner seeking disqualification of the sole respondent under Section 9A of 'the R.P. Act' does not find support from the evidence on record as well from the statutory provision regulating the issue and is accordingly rejected. Issue nos. IV & V are decided accordingly.

The discussions on the issue above are sufficient to hold that the election of the sole respondent to the 93 Barhara Constituency in the district of Bhojpur suffers no disqualification under Section 9A of 'the R.P. Act' requiring any interference.

In result, the election petition is dismissed but without any order as to costs.

**Jyoti Saran, J**

आदेश से,

आनन्द कुमार पाठक,

सचिव

भारत निर्वाचन आयोग।

## ELECTION COMMISSION OF INDIA

### NOTIFICATION

*Nirvachan Sadan, Ashoka Road, New Delhi-110001/ Dated 24<sup>th</sup> December, 2018, 3 (Pausha), 1940 (Saka)*

No. 82/BR-LA/EP/(06/2015)/ES-1/2018:- In pursuance of Section 106 (6) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the Order dated the 28/06/2018 of the High Court of Judicature at Patna in Election Petition No. 06/2015

### IN THE HIGH COURT OF JUDICATURE AT PATNA

#### Election Petition No.6 of 2015

Asha Devi wife of Sri Surendra Singh Resident of Village, P.O. and P.S. Krishnagarh,

District- Bhojpur at Ara ....

Election Petitioner/s

Versus

Saroj Yadav @ Saroj Kumar, Son of Sri Rama Shankar Yadav, Resident of village- Keshopur,

P.O. and P.S. Barhara, District- Bhojpur at Ara

..... Respondent/s

#### Appearance :

For the Petitioner/s : Mr. S.B.K Manglam, Adv.

: Mrs. Anita Kumari, Adv.

For the Respondent/s : Mr. P.K Verma, Sr. Adv.

: Mr. Suman Kumar Jha, Adv.

### CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

#### C.A.V JUDGMENT

**Date: 28.06.2018**

The election petition filed under Section 80A and 81 of the Representation of People Act, 1951 (hereinafter referred to as 'the R.P. Act') questions the election of the sole respondent as Member, Bihar Legislative Assembly from 193, Barhara Assembly Constituency in the district of Bhojpur in the election held on 28.10.2015.

The pleadings on record shows that as per the notification issued by the Returning Officer – cum- Additional Collector, Bhojpur at Ara, the programme for election was notified as follows:

Last date for filing of nomination paper	: 08.10.2015
Date of Scrutiny of nomination paper	: 09.10.2015
Date for withdrawal of nomination paper	: 12.10.2015
Date of poll, in case of contested election	: 28.10.2015
Date of counting	: 08.11.2015
Date of declaration of result	: 08.11.2015

The election petitioner, the sole respondent and several others filed their nomination before the Returning Officer. The nomination filed by all 12 candidates was found valid by the

Returning Officer and a list of the contesting candidates was published on 12.10.2015. The name of these candidates finds mention at paragraph 7 of the election petition. While the election petitioner contested the election on a ticket of the Bhartiya Janta Party (hereinafter referred to as the 'BJP'), the respondent contested the election as a candidate of the Rashtriya Janta Dal ( hereinafter referred to as the 'RJD'). The election was held on 28.10.2015, the counting of votes was carried out on 08.11.2015 and the respondent was declared elected by the Returning Officer having secured 65001 valid votes as against 51693 valid votes secured by the election petitioner. The sole respondent was thus declared elected by a margin of 13,308 votes. It is feeling aggrieved by the election of the sole respondent that the present election petition has been filed.

The pleadings in the election petition would reflect that the challenge is resting primarily on grounds that the sole respondent was a registered Government contractor and there was a contract subsisting in his name on the date of his election.

It is the case of the election petitioner that the sole respondent is the proprietor of M/s Ujjawal Enterprises which firm was registered as a Class II contractor with the Rural Works Department bearing registration No. (RWD) -1995/2011 issued on 04.01.2011. It is also the case of the election petitioner that the sole respondent signed a contract with the Executive Engineer, Local Area Engineering Organization (hereinafter referred to as the 'LAEO') Work Division II, Jagdishpur (Bhojpur) for execution of contract for construction of Panchayat Sarkar Bhawan for Belauti Panchayat under Shahpur Block in the district of Bhojpur. It is mentioned that a work order was issued in favour of M/s Ujjawal Enterprises vide letter No. 36 dated 14.01.2015 by the Executive Engineer and the firm was directed to complete the contract by 13.01.2016. According to the election petitioner, it is while this contract was subsisting for its completion on 13.01.2016 that not only the nomination was filed by the sole respondent on 16.10.2015 but even the election result was declared on 08.11.2015. According to the petitioner, the sole respondent stands disqualified under Rule 9A of 'the R.P Act' read along side Article 191(1) (a) of the Constitution of India because the contract awarded to the firm of the sole respondent was subsisting not only on the date on which the sole respondent filed his nomination but even on the date of declaration of the result.

The sole respondent has appeared through counsel and has filed his written statement denying all assertions made in the election petition to submit that the contract in between the state and the sole respondent was not subsisting rather stood severed much prior to the filing of the nomination in October, 2015. While raising issues on the maintainability of the election petition itself, it is stated that no contract was subsisting to attract the provisions of Section 9A of 'the RP Act'. According to the sole respondent, the registration of M/s Ujjawal Enterprises as Class II contractor was cancelled on 03.02.2015 by the Rural Works Department and had not been renewed. It is further stated that the work on the project had been stopped in March 2015, much prior to the filing of nomination and thus no contract was subsisting on the date of nomination. It is taking note of the issues proposed by the contesting parties that vide order passed on 19.09.2016 the following issues were framed for adjudication of the dispute:

- (i) Whether the election petition is not maintainable and fit to be dismissed summarily under Section 86 of the Representation of People Act, 1951 ( for short 'the Act') for non- compliance of Section 81 of the Act?
- (ii) Whether the election petition does not contain a concise statement of material facts and hence fit to be dismissed for non-compliance of the provisions under Section 83(1)(a) read with Section 86 of the Act?
- (iii) Whether the pleadings in the election petition are vague, frivolous and scandalous and did not make out a triable issue under the provisions of Section 100(1) of the Act?
- (iv) Whether in view of subsisting contract in the name of sole respondent on the date of his election, the sole respondent was disqualified to contest the impugned election in view of the provisions contained under Section 9(A) of the Act?



- (v) Whether the election of the sole respondent is fit to be declared void on the ground that on the date of his election, he was disqualified to contest the said election under Section 9(A) of the Act?'

The election petitioner has examined the following witnesses in support of the election petition:

- (i) P.W. 1 is the election petitioner Asha Devi.
- (ii) P.W.2 is Awadhesh Kumar Singh, a social worker, associated with the BJP.
- (iii) P.W. 3 is Awadh Kumar Singh, the Executive Engineer, LAEO, Work Division II, Jagdishpur, Bhojpur

The following documentary evidence was led by the election petitioner:

- (i) Ext. 1 is the signature of the Awadhesh Kumar Singh on the application filed under the Right to Information Act.
- (ii) Ext. 2 is the application filed by Awadhesh Kumar Singh (P.W.2) under the RTI Act seeking information.
- (iii) Ext. 3 is a letter No. 849 dated 05.12.2015 issued by the Executive Engineer, LAEO, Work Division II, Jagdishpur addressed to P.W.2, Awadhesh Kumar Singh.
- (iv) Ext. 4 is the original letter No. 849 dated 05.12.2015 produced by the learned counsel for the election petitioner.
- (v) Ext. 5 is a letter No. 36 dated 14.01.2015 containing work order issued by the Department in favour of M/s Ujjawal Enterprises.
- (vi) Ext. 6 is the agreement between the Department and M/s Ujjawal Enterprises proprietor Saroj Yadav.
- (vii) Ext. 7 is the letter No. 382 dated 05.07.2016 through which documents were forwarded to this Court.
- (viii) Ext. 8 series are the affidavits of sole respondent Saroj Yadav@ Saroj Kumar.
- (ix) Ext. 9 is the letter dated 03.10.2015 written by the sole respondent Saroj Yadav for closure of the contract.
- (x) Ext. 10 is the letter No. 287 dated 09.04.2016 issued by the Executive Engineer.
- (xi) Ext. 11 is the letter No. 479 dated 25.08.2016 through which documents were forwarded to this Court.
- (xii) Ext. 12 is the measurement book for the Belauti Panchayat Sarkar Bhawan.
- (xiii) Ext. 13 is letter No. 80 dated 25.01.2016 of the Executive Engineer addressed to the Chief Engineer, LAEO.
- (xiv) Ext. 14 is the letter No. 912 dated 31.12.2015 written by the Executive Engineer to the Chief Engineer.
- (xv) Ext. 15 is the letter dated 17.01.2011 of the Rural Works Department, Bihar, Patna regarding registration certificate of the sole respondent which was valid for 5 years (14.01.2011 to 13.01.2016).
- (xvi) A letter bearing No. 849 dated 05.12.2015 received by P.W.2 Awadhesh kumar Singh under the RTI Act has been marked 'X' for identification.

The sole respondent examined the following witnesses in support:

- (i) R.W.1 is Ram Dahin Rai, a Rajmistry who had worked on the Panchayat Sarkar Bhawan.
- (ii) R.W.2 is Rakesh Kumar who was employed as Munsu by the sole respondent Saroj Yadav for supervising the construction work.
- (iii) R.W.3 is Ram Darshan Yadav @ Guddu Yadav an agriculturist, who claims to have been employed by the sole respondent Saroj Yadav for looking after the construction work.
- (iv) R.W.4 is Kamallesh Chaudhary, the Chief Engineer III, Rural Works Department.
- (v) R.W.5 is Bidu Bhushan Prasad, Director, Department of Information and Public Relation.

- (vi) R.W.6 is Dharma Dev Chaudhary, the Engineer in Chief cum Additional Commissioner cum Special Secretary, Rural Works Department, Government of Bihar, since retired on 31.03.2015.
- (vii) R.W.7 is Md. Hussain Alam, the Junior Engineer, LAEO, Work Division II, Jagdishpur.
- (viii) R.W.8 is the sole respondent Saroj Yadav @ Saroj Kumar himself.

A part from the oral evidence, the sole respondent has also led the following documentary evidence:

- (i) Ext. A series is the progress report of the contract work.
- (ii) Ext. B is the letter No.167 dated 22.01.2016 of the Chief Engineer written to the Executive Engineer.
- (iii) Ext. C is letter No. 492 dated 02.03.2016 of the Chief Engineer issuing direction to cancel the contract.
- (iv) Ext. D is letter dated 26.11.2014 of the Engineer in Chief addressed to the Director, Information and Public Relation regarding publication of notice for online registration.
- (v) Ext. E is public notice by the Rural Works Department, Patna for online registration by the existing contractors as well as new entrance.
- (vi) Ext. F is letter dated 28.01.2016 of the Engineer in Chief, Rural Works Department, Bihar, Patna regarding cancellation of the registration of the sole respondent Saroj Yadav.
- (vii) Ext. G is the letter No. 282 dated 23.03.2017 of the information and Public Relation Department whereby documents had been forwarded to this Court.
- (viii) Ext. H series are advertisements published in Dainik Jagaran, Times of India and Prabhat Khabar in respect of enrollment of contractors.
- (ix) Ext. I series are advertisements published in Dainik Jagaran, Prabhat Khabar and Farukhi Tanzim for online registration of contractors.
- (x) Ext. J series is newspaper publications.
- (xi) Ext. K is the affidavit portion of the notice
- (xii) Ext. K/1 is verification of the notice.
- (xiii) Ext. L is the letter dated 03.10.2015 of the petitioner bearing receipt given by the Peon in the office of the Executive Engineer, LAEO.

All exhibits have been marked without objection of the other side except Annexure-K series.

The arguments was initiated by Mr. Prabhat Kumar Verma, learned Senior counsel appearing for the sole respondent.

In reference to the pleadings in the election petition more particularly paragraph 16 onwards, he submits that the election of the sole respondent is primarily challenged on two grounds namely:

- (a) The contract entered in between the sole respondent and the State Government was subsisting on the date of filing of the nomination; and
- (b) The petitioner had given an incorrect declaration about his accommodation as well as his occupation and his wife's occupation against the queries made in paragraph 9 of the affidavit in Form 26 which is a part of the nomination form.

Contesting the allegation of false declaration, learned counsel made reference to Section 33A of 'the R.P. Act' to submit that the provisions introduced vide Amendments Act, 72 of 2002 recognizes the right of the voters to the information relating to the candidate as regarding his involvement in any criminal case exclusively and not anything further. It is argued that the disclosure in a nomination form and a disclosure in Form 26 are distinct and the occupation of the candidate is not a relevant factor for unsuiting him in view of the intendment present in Section 33A. He further submits that the relevant disclosures to be given in Form 26, finds discussed only in Section 33A and nowhere else in the statute.

Learned counsel next turns to written statement to submit that the presentation of the election petition is not in terms of Section 81(3) inasmuch as the additional copies of the election petition, duly attested, was not filed by the election petitioner which itself was sufficient for dismissal of the election petition under Section 86 of 'the R.P. Act'.

Learned counsel has made reference to the order dated 19.09.2016 whereby the issues were framed, to canvass that issue no.

(i) does take note of such objections raised by the sole respondent. He turns to the affidavit portion of the additional copy to submit that it is not the same as the original and thus cannot be called a true copy of its original. According to learned counsel since the signature of the Oath Commissioner is missing in the additional copy, it cannot be called a true copy of its original.

Learned counsel has taken this Court through the different paragraphs of the written statement to submit that the registration of the firm of which the sole respondent was the proprietor, ceased to operate and the work was stopped much prior to the filing of the nomination. According to learned counsel, the registration of the firm itself was cancelled on 03.02.2015. He refers to the statement made in paragraph 10 of the written statement to submit that a departmental notification was issued by the Rural Works Department informing the registered contractors to make fresh enrollment on or before 03.02.2015 and upload the same otherwise their registration shall stand cancelled. In support, learned counsel has made reference to Ext. D which is the notice of the Rural Works Department to such effect. Learned counsel has referred to Ext. F which is letter dated 28.01.2016 of the Engineer in Chief addressed to the sole respondent informing him about the cancellation of his registration with effect from 03.02.2015. It is thus argued that where the registration of the sole respondent itself was cancelled on 03.02.2015 and information to such effect was given albeit on 28.01.2016, it would be a confirmation of the position that the contract was not subsisting on the date of filing of the nomination.

Learned counsel has referred to Ext.6 which is the agreement entered in between the parties and is in the name of the firm M/s Ujjawal Enterprises, not the sole respondent. In reference to Ext. 3 which is the letter dated 05.12.2015 of the Executive Engineer he informs that the nature of the contract as well as its duration stands discussed. It is argued that due intimation was given by the sole respondent on 03.10.2015 to the Executive Engineer, Rural Works Department that the firm was no longer interested to pursue the contract and hence the same be closed and the outstanding bill be paid. In support, learned counsel has referred to Ext. L which is a letter of the sole respondent addressed to the Executive Engineer, LAEO, Work Division II and bears receipt dated 03.10.2015. Learned counsel in reference to the objection present at paragraph 17 of the written statement has submitted that at no stage of the election process did the election petitioner raise any objection against the candidature of the sole respondent either at the stage of filing of the nomination or at the stage of scrutiny but having lost the contest that the issue of disqualification is being raised which should have been raised at the very threshold or within a reasonable time.

Turning to the main issue raised in the election petition as regarding the alleged disqualification of the sole respondent under Section 9A of 'the R.P. Act', learned counsel has referred to the statutory provisions underlying Section 9A of 'the R.P. Act' to submit that a disqualification of such nature is only in a condition where 'their subsists a contract' entered by a candidate with the appropriate Government for supply of goods or for execution of any work. According to learned counsel, it is only so long that a 'contract subsists', which would render a candidate disqualified and not in any other circumstance. According to Mr. Verma, where the contract is brought to an end by a positive act or the conduct of the parties, even if the same would constitute a breach, yet it would mean that the contract has ended. According to learned counsel, the failure of the sole respondent to upload his registration in compliance with the notice at Ext. D which inter alia stipulated for cancellation of registration on the failure of the contractor concerned to upload his registration on or before 03.02.2015 coupled with the fact that no construction work was carried out since after March, 2015 which two aspects are of a period much prior to the

initiation of the election process, the contract had come to an end and thus the plea raised under Section 9A of 'the R.P. Act' lacked foundation.

Learned counsel has referred to the evidence of the election petitioner as P.W.1 to submit that she accepts her presence during scrutiny and also accepts knowledge about the sole respondent engaged in contractual work yet did not choose to raise any objection during the nomination or during scrutiny. He also refers to the evidence given by the Awadhesh Kumar Singh as P.W.2 to submit that he admits lack of knowledge on the progress in the construction of Panchayat Sarkar Bhawan since March 2015. It is argued that the evidence is hearsay and there is nothing in the evidence of these two witnesses which would make out a case for disqualification of the sole respondent. It is argued that there is no bona fide or reliability in the evidence of the P.W.2 who himself is an agent and has brought nothing on record to confirm the allegation.

Mr. Verma has next referred to the evidence of the Executive Engineer, Awadh Kumar Singh as P.W.3 to submit that he acknowledges that a request was made by the sole respondent on 03.10.2015 for closure of contract and also identifies the letter marked Ext.9 which letter according to the witness was docketed on 31.12.2015 bearing diary No.166. In reference to the statement of the said witness during his cross examination, he submits that it was well accepted that no work was carried out since after 19.03.2015. In reference to the witnesses" examined on behalf of the sole respondent he submits that Ram Dahin Rai and Rakesh Kumar examined as R.W.1 and R.W.2 respectively have given evidence on the start as well as the closure of work in March, 2015. In reference to the evidence of Ram Darshan Yadav as R.W.3 he submits that even this witness confirms closure during Holi festival which falls in March, 2015. Learned counsel has referred to the evidence of the Chief Engineer examined as R.W.4 to submit that evidence has come that the last date for receiving online application for registration by the existing contractor was fixed on 03.02.2015 and though, it was extended 3 times, it expired on 03.09.2015. He submits that the witness has admitted that vide letter dated 28.01.2016, the sole respondent was intimated about the cancellation of his registration with effect from 03.02.2015. According to Mr. Verma, the sole respondent by his conduct of abandoning the work & failure to upload registration, had made it well known that the contract was not subsisting and which action is confirmed by his follow up application for closure of the contract. It is argued in reference to the evidence of the Chief Engineer P.W.4 that though the date for uploading the registration was extended until 30.09.2015, yet the respondent did not comply. Meaning thereby, if not earlier, then at least w.e.f 30.09.2015, the registration of the firm stood cancelled.

In reference to the evidence of R.W.5 Bidu Bhushan Prasad, the Director, Department of Information and Public Relation, he submits that the publication of the notice in 3 Newspaper vide Annexure H series has been endorsed by him which put the contractors on notice for uploading their registration on or before 03.02.2015 failing which the registration would stand cancelled. He refers to the evidence of R.W. 6 Dharam Dev Chaudhary, the Engineer In Chief cum Additional Commissioner cum Special Secretary who deposed that a registration for a contractor is compulsory, meaning thereby, that if the sole respondent failed to upload his application for registration within the time stipulated in the notice, it stood cancelled and whereafter the sole respondent could not have carried out the contractual work.

According to Mr. Verma, there is a mark difference between rescinding of a contract and which is by a positive order in comparison to a situation reflecting that the contract was not subsisting. According to Mr. Verma, even if a contract had not been rescinded, the action of the parties to an ongoing contract itself would indicate whether or not, the contract subsists between them. Learned counsel has referred to the evidence of R.W.7 Md. Hussain Alam, the Junior Engineer to submit that he has admitted that no work was carried out after 18.03.2015. Mr. Verma, has finally referred to the evidence of the election petitioner who deposed as P.W.1 to submit that no objection was raised on the candidature of the sole respondent either during presentation of the nomination or during scrutiny or even during counting process. He submits that the husband of the election petitioner in fact congratulated the sole respondent on his success. It is submitted that sole respondent has deposed that the copy of the election petition so received by him on notice

neither contains the name of the authority before whom the affidavit was sworn nor the name of the verifier is present in the verification portion. According to Mr. Verma this lacunae renders the election petition itself defective for its dismissal under Section 86. It is submitted that the respondent has deposed on the intimation on closure given by him on 03.10.2015 vide Ext.9 and Ext. L which also bears the diary entry as well as the receiving date respectively. It is argued that the witnesses have identified the order dated 09.04.2016 marked Ext. 10 as the order passed on his application filed for closure of the contract. In reference to the evidence of the sole respondent during his cross examination, it is argued that it has been accepted by the sole respondent that he is a first timer in the civil contract work and that since his wife as a Zila Parishad Member was not drawing salary or honorarium that he had mentioned her as a house wife. It has further been deposed by the sole respondent that though Ext.9 and Ext L are the copies of the same document but the receiving is present on Ext. L. It is the argument of Mr. Verma that since the election petitioner has not contested the veracity of the Ext. L which has also been enclosed as Annexure R/3 to the written statement, the receiving present thereon cannot be doubted. It is argued that while Ext. R/L mentions the date of receiving of the request made by the sole respondent on 03.10.2015, the remarks on Ext. 9 mentions the diary number and the date on which the letter was docketed.

In sum and substance, it is the argument of Mr. Verma that the word 'subsists' as it occurs in Section 9A has to be tested in the background of the circumstances existing in any contract and in such of the cases where parties stopped working or fail to renew his registration this conduct itself would bring the contract to an end and in such cases a contract cannot be termed as 'subsisting'. According to Mr. Verma even if such action would amount to a breach of contractual obligation and even if a possible consequence thereof would be a rescinding of a contract but this again goes to prove that the contract was not subsisting.

Learned counsel in support has relied upon a judgment of the Supreme Court reported in **AIR 1984 SC 988 (Smt. Aslhing versus L.S. John)** to submit that a similar situation arising in the said case, the Supreme Court held that the conduct of the contractor confirmed that the contract was not subsisting. He submits that the failure of the sole respondent to comply with the notice to upload his registration application confirmed that he was no more interested in continuation with contractorship. According to Mr. Verma the act of abandoning the project since after March, 2015 is a conclusive confirmation of his intent of closure of the contract. It is argued that the very fact that an application was filed by the sole respondent on 03.10.2015 much prior to the filing of the nomination confirms the sequence. Learned counsel has referred to the judgment of the Supreme Court reported in

**AIR 1981 SC 1177 (S.Munishamappa Versus B.Venkatarayappa)** to submit that the intent of Section 9A has been discussed and the opinion at paragraphs 16, 17 and 18 supports the case of the petitioner. To the same effect learned counsel has relied upon a judgment of the Supreme Court reported in **AIR 1976 SC 2130 (Jugal Kishore Patnayak versus Ratnakar) paragraphs 12, 13 and 14**. Per contra, it is the argument of Mr. S.B.K. Mangalam learned counsel appearing for the election petitioner that the entire issue revolves around the letter dated 03.10.2015 of the sole respondent marked as Ext.9 and Ext. L which though is dated 03.10.2015 but whether it was received on 03.10.2015 or was received on 31.12.2015 would be the relevant issue. According to Mr. Mangalam, since the docket No. 166 is dated 31.12.2015, presumption lies that the letter was handed over only on 31.12.2015. He submits that even if much has been canvassed on behalf of the sole respondent that he abandoned the project since after March, 2015 but there is nothing on the record to support that any attempt was made by the sole respondent to inform the department about his intention until 03.10.2015 or 31.12.2015 as the case may be. Distinguishing the judgment in the case of Aslhing (supra) he submits that in the case put for consideration before the Supreme Court there is no dispute as regarding the filing of the letter by the contractor evincing his intent not to carry out the contract but this relevant aspect is debatable in the present case and would be governed by the material present in Ext. 9 and Ext. L. According to Mr. Mangalam, the receiving dated 31.12.2015 appears more reasonable as it is after filing of the

election petition and perhaps on receipt of notice. It is the argument of Mr. Mangalam that though Ext. L bears a receiving of 03.10.2015 but neither there is any statement in the written statement as to who has received the application nor has the receiver been examined in the proceeding. In support he makes reference to the statement made in paragraphs 9 and 14 of the written statement.

Turning to the evidence of RW 8 i.e the sole respondent he submits, that the evidence of the sole respondent fails on the absence of mentioning of the dates in the measurement book which creates a doubt whether or not, the work was in fact stopped in March. It is argued that there is nothing on record which supports the claim of the petitioner that the work was stopped since after March, 2015 nor there is any report of the departmental authority in this regard. He submits that the name of recipient of the letter is not mentioned either in the written statement or has been disclosed in the deposition and there is no system prevailing in the Government where the applications are received by a Peon. It is the argument of Mr. Mangalam that burden of proof lies on the party having special information about the matter in terms of Section 106 of the Evidence Act and since it is the case of the sole respondent that he handed over his application to a Peon, the onus lay on the sole respondent to disclose his name and/or to examine him.

Referring to Ext. 2 which is the application of P.W 2 Awdhesh Kumar Singh under the RTI Act seeking information on the agency entrusted with the construction work of Panchayat Sarkar Bhawan, he submits that the information so asked was provided vide letter No. 849 dated 05.12.2015 marked as Ext. 3 and which clearly mentions the time of completion of the project as 13.01.2016. He argues that the information was given on 05.12.2015 which means that the contract was subsisting on the date.

It is the argument of Mr. Mangalam that although the Executive Engineer concerned was examined as P.W 3 but no questions were put on the receiving of the application. It is submitted that while most witnesses have deposed that the construction work was carried out until the lintel level, Ext. A series would confirm that as until 01.05.2015 the construction work was done up to the plinth level. He further submits that the progress report Ext. A series also confirms that brick work was going on since after 02.06.2015 until 01.10.2015 when it was stopped. According to Mr. Mangalam, the evidence at Annexure A series itself falsifies the evidence of the witnesses examined by the sole respondent who have deposed that no construction work was carried out after March, 2015.

Learned counsel has next turned to the evidence of the Chief Engineer as R.W. 4 to submit that while according to the sole respondent his registration got automatically cancelled by his failure to upload his online application pursuant to the notice so published by the Department, the Chief Engineer has stated that the sole respondent had filed his application for cancellation of registration only in 2016 and that there was no automatic cancellation of the contract on non uploading of the registration application. Learned counsel has taken this Court through the evidence of the Engineer In Chief as R.W. 6 to state that there was no automatic cancellation of contract on the cancellation of registration of any contractor. Referring to the evidence of R.W. 7 Md. Hussain Alam, the Junior Engineer it is submitted that the witness had accepted that no communication was received from the contractor regarding stoppage of work from 15.03.2015 or that he had left the construction work. It is argued that where the evidence on record shows that the work continued until 01.10.2015, the failure of the sole respondent to examine the receiver of Ext. L or have his signature identified by any of the official witness, comments on the veracity of the document. According to Mr. Mangalam while Ext. L is a document generated to save the respondent, Ext. 9 is the authentic document and confirms that intimation was given by the sole respondent only on 31.12.2015. According to Mr. Mangalam, the receiving on Ext. L has been generated by ante dating the same and which is confirmed when tested against Ext. 9 and corroborated through letter No. 849 dated 05.12.2015 marked Ext. 4 whereby P.W. 2 Awadhesh Kumar Singh was given information about the delay in the contract. According to Mr. Mangalam, Ext. 4 itself confirms that no application had been received by the Department until the said date because if any such information was in possession of the Executive Engineer, the same would have

been mentioned in the information so given. According to Mr. Mangalam, it is for the first time that an application dated 03.10.2015 was received by the Executive Engineer on 31.12.2015 and whereafter proceeding was initiated for termination of the contract vide Ext. 14 when the Executive Engineer sought guidelines from the Chief Engineer in reference to the request present in the letter of the sole respondent dated 03.10.2015 which was received in the office of the Chief Engineer on 15.01.2016. Turning to Ext. A series again, he argues that though evidence was led that work was stopped in Holi, in March, 2015 but the evidence on record shows that the work continued until 01.10.2015. Learned counsel has referred to a judgment of the Supreme Court reported in **(2002) 8 SCC 467 (Rajsekhar Basavaraj Patel vs. Subhash Kallur & Ors)** and in reference to the opinion expressed at paragraph 23 he submits that in a similar situation prevailing in the said case, the receiving canvassed was rejected by the Supreme Court. Learned counsel has referred to another Judgment of **the Supreme Court reported in 2004 (1) PLJR (SC) 261 (Sushil Kumar versus Rakesh Kumar)** and in reference to paragraph 9 of the judgment it is submitted that the burden of proof to establish the receiving lies on the sole respondent. Concluding his argument it is submitted by Mr. Mangalam that there is no substantive piece of evidence confirming the closure of contract prior to the filing of the nomination by the sole respondent and the evidence whatsoever relied upon together with case laws relied upon by Mr. Verma, is not sufficient enough to support the claim of the sole respondent.

By way rejoinder Mr. Verma has turned to Ext. 9 and Ext. L to submit that each of these document have been marked without objection and thus once the veracity of the document has not been questioned, the contents present therein cannot be questioned on veracity. It the submission of Mr. Verma that the very fact that action was initiated on the application of the sole respondent dated 03.10.2015 for closure of the contract, it certainly cannot be called a fabricated document.

According to Mr. Verma, though objections are raised on the receiving dated 03.10.2015 but no evidence was led by the election petitioner to such effect. It is submitted that while each of the official witness have agreed to the submission of the application dated 03.10.2015 by the sole respondent, once this is accepted then and nothing was left to demonstrate that the said application was in time nor there is any scope for raising any doubt. Learned counsel in reference to Ext. 10 which is the letter of cancellation issued by the Executive Engineer bearing No. 287 dated 09.04.2016 submits that it is on the application dated 03.10.2015 of the sole respondent that the contract was cancelled and which letter also clearly mentions that on receipt of such application, the final measurement was taken on 04.10.2015 which is much prior to the filing of the nomination by the sole respondent. It is submitted that similar is the situation at Annexure 12 which is the measurement book and records final measurement on 04.10.2015 on the closure application dated 03.10.2015.

According to Mr. Verma, it is only on account of the different dates occurring in Ext. 9 and Ext. L which has given a reason to the election petitioner to raise doubts on the intent of closure shown by the sole respondent. It is submitted that the doubt so raised needs to be tested along side the accompanying facts which are relevant for adjudication. In reference to Ext. 13 which is the letter dated 25.01.2016 of the Executive Engineer addressed to the Chief Engineer, he submits that the specific details present therein would confirm that work was stopped much prior to the filing of the application on 03.10.2015 and whereafter measurement was carried out and the amount payable was quantified.

Reverting to the evidence of R.W. 4 Kamlesh Chaudhary the Chief Engineer along side the advertisement/newspaper publications led as Exts. H, I and J , it is argued that the last date mentioned for uploading the application for registration was 03.09.2015 and the very fact that the petitioner never uploaded his application was sufficient indication that he had no interest in continuing with the contract work.

In response to the progress report at Annexure-A series relied upon by Mr. Mangalam to canvass that the work continued until October, learned counsel relied upon Ext. 12 i.e the measurement book to state that though it takes note of the progress of work until 18.03.2015 but

thereafter it records no progress rather closes the measurement on 04.10.2015 which is sufficient to prove that no work was carried out in between 18.03.2015 to 04.10.2015.

Rebutting the argument of Mr. Mangalam in shifting the onus in reference to Section 106 of the Evidence Act, it is submitted by Mr. Verma that once the allegation is supported with cogent materials, the onus reverts to the party making such allegation. Learned counsel has relied upon following judgments of the Supreme Court:

- (1) (1975) 4 SCC 862 (Moti Lal versus Chandra Pratap Tiwari & Ors.),
- (2) AIR 1968 SC 929 (Laxman Siddappa versus K. Chaniappa)
- (3) 1985 Spl. SCC 111 (Umed Singh Raw versus Mani Ram Godara) and page 179 (Leela Kishan versus Mani Ram Godara)

Learned counsel with reference to the judgment of the Supreme Court reported in AIR 2010 SC 905 (P.C Thomas versus P.N Ismail) submits that once a material evidence have been marked exhibit they cannot be charged on forgery.

I have learned counsel for the parties and I have perused the records.

Although exhaustive arguments have been advanced by either side but the core issue which would determine the fate of the present contest is, whether or not the contract entered in between the sole respondent and the appropriate Government, was subsisting on the date of filing of the nomination.

Of the issues so framed by this Court on 19.09.2016, while issue No. (I), (II) and (III) relate to the maintainability of the election petition, raised by the sole respondent through his written statement, issue No. (IV) and (V) raises issue of disqualification of the sole respondent in reference to the provisions underlying Section 9A of 'the R.P. Act'.

#### **Issue Nos. I, II and III:**

Since these three issues raise questions on the maintainability of the election petition itself that they have been taken up together. Surprisingly even though the sole respondent has raised issues of maintainability of the election petition inter alia on grounds of failing to satisfy the statutory provisions underlying Section 81, 83 (1) (a) and Section 100 (1) of 'the R.P. Act' and on grounds that the pleadings are vague, frivolous and scandalous but in my opinion the objections are ornamental and have been taken in a routine opposition of the contest because no such infirmity can be found present in the election petition. Despite reliance placed on Section 81(3) of 'the R.P Act', no evidence was led to demonstrate any deviation in pleadings present in the Court copy from the one served on the respondent. Simply because the Oath Commissioner signature/seal or verifier's signature was not present in the notice issued, would, in my opinion, not render it defective because it is the pleadings on record which would be relevant consideration for such objection and not any procedural defect.

Even the allegation of vagueness of the pleadings or its scandalous character are not supported from record rather are bald assertions.

In the circumstances noticed, in my opinion the objections raised by respondent on the maintainability of the election petition, is ornamental, taken in a routine manner, lacking in seriousness and are thus only taken for their rejection.

Issues No. I, II and III are accordingly decided in favour of the election petitioner.

#### **Issue Nos. IV & V:**

I would now proceed to consider issue No. IV and V which go to the root of the matter and is the foundation for the contest herein. According to Mr. Verma, it is not correct to say that unless a contract is rescinded, it shall deem to be subsisting. According to him whether a contract is subsisting, is to be determined on the basis of the facts and circumstances accompanying the situation as well as the conduct of the parties thereto. Per Contra, it is the submission of the Mr. Mangalam that a closure to a contract has to be by a positive action.

In so far as the case in hand is concerned, the contract in between the sole respondent and the appropriate Government was rescinded vide office order bearing No. 2 dated 09.04.2016 marked Exhibit 10 whereby the contract in between the parties bearing No. 73F2/ 2014-15 was cancelled. While according to Mr. Verma there are sufficient materials on record of the pleadings



to demonstrate the intent of the sole respondent to a closure of the contract, according to Mr. Mangalam, the documents have been generated after the election of the sole respondent with the sole intention of escaping disqualification staring under Section 9A of 'the R.P. Act'. I have already discussed the evidence relied upon by the contesting parties in support of their respective submissions in extenso but concentrating on the issue of disqualification I deem it proper to deal with the same again before recording my opinion thereon.

Exhibit 6 is the contract entered in between the sole respondent on one hand and the Executive Engineer, 'LAEO' Work Division II on behalf of the appropriate Government, on the other hand dated 14.01.2015 and according whereto the work of construction of the Panchayat Sarkar Bhawan was to be completed until 13.01.2016. Since the award of contract is not put to question, I do not deem it necessary to deal with other evidence relatable thereto.

The next relevant document is Ext. 9 which is a letter dated 03.10.2015 written by the sole respondent addressed to the Executive Engineer 'LAEO' Work Division II intimating him that he is not interested in executing the work and thus step be taken for closure of the contract and for making payment of the amount admissible to him. This letter bears a receiving No. 166 dated 31.12.2015. A photo copy of the letter has been led by the sole respondent as Exhibit L and this bears a receiving which is dated 30.10.2015.

The measurement Book has been marked as Ext. 12 and records that the work was executed until 18.03.2015 but thereafter there is no recording except for the final measurement done on 04.10.2015 in presence of the sole respondent.

Ext. 14 is the letter No. 912 dated 31.12.2015 of the Executive Engineer, 'LAEO' addressed to the Chief Engineer seeking guidelines on the letter dated 03.10.2015 of the sole respondent as proprietor of M/s Ujjawal Enterprises for closure of the contract.

Ext. 13 is the letter of the Executive Engineer, LAEO to the Chief Engineer bearing No. 80 dated 25.01.2016 whereby in reference to the application of the sole respondent dated 03.10.2016, it is intimated that the sole respondent was not interested in the work and on his application the final measurements have been carried out, hence orders may be issued for closure of the contract.

Ext. B is the letter bearing No. 167 dated 22.01.2016 of the Chief Engineer addressed to the Executive Engineer, LAEO Work Division II, Jagdishpur to submit his report as to the current status to the matter.

Ext. C is the second letter of the Chief Engineer bearing No. 492 dated 02.03.2016 addressed to the Executive Engineer, LAEO issuing direction for cancellation of the contract.

Ext. 10 is the order of cancellation issued by the Executive Engineer bearing letter No. 287 dated 09.04.2016.

Annexure A series is the progress report of the contract work which was relied upon by Mr. Mangalam to canvass the continuation of work until 01.10.2015.

Ext. H, I and J series are notices/advertisements intimating the contractors for uploading their application online for registration failing which the same would be cancelled. While initially the date for such uploading was fixed as until 03.02.2015 as manifest from Ext. H series but this was extended vide Ext. I and vide Ext. J the last date extended was until 30.09.2015. There is no dispute that despite the public notice/advertisement at Exhibits H, I and J series, the sole respondent never bothered to upload his application for online registration as contractor and the effect of which would be, that if not earlier but surely with effect from 30.09.2015, his registration as contractor stood cancelled. There can be no contest on the consequences of non uploading of the online application for registration as directed in the notices and thus there can be no dispute that the registration of the sole respondent at Ext. 15 which was otherwise valid until 13.01.2016, stood cancelled by his failure to comply with the notice/ advertisement at Ext. H, I and J at least with effect from 30.09.2015 if not earlier. In other words the sole respondent lost his status as a registered contractor by his conduct and on his failure to upload his registration application. In my opinion this aspect alone is sufficient to conclude that the contract was no more subsisting in between the sole respondent and the government on his loss of status as a registered contractor,

at least since after 30.09.2015 which is much prior to the filing of the nomination on 08.10.2015. The other aspect of the matter is the conduct of the sole respondent in practically abandoning the project since after 18.03.2015 as it stands confirmed from the measurement book which does not record any construction since after 18.03.2015. Much reliance has been placed by Mr. Mangalam to the progress report at Ext A series to canvass that the work continued until 01.10.2015 but a cursory glance to the progress report of the contract work at Ext.-A series would confirm that it merely reported the status of the matter and not the stage of construction. The report on the status of the project at Ext 'A' series does not give any indication of the stage of the project. While in April, 2015, the report simply mentions that the work was completed until plinth level, thereafter there is no report on the progress except that the term 'brick work' has been mentioned, and in the report for September, 2015, it is mentioned that the work has stopped. Even going by the assertions made by Mr. Mangalam, there is no contest that the construction work ceased in September, 2015 which is much prior to the filing of the nomination. I would now turn to the letter dated 03.10.2015 of the sole respondent which was led as Ext. 9 and Ext. L by the parties. While Ext. 9 bears a No. 166 dated 31.12.2015, Ext. L bears receiving on 03.10.2015. Each of the two exhibits have been marked without objection.

Mr. Verma is absolutely on safe ground to submit that once this document is marked exhibit without objection, it cannot be questioned on the veracity of its contents nor there is any occasion for the sole respondent to prove its contents. The Executive Engineer concerned has been examined as P.W. 3 by the election petitioner and who admits that the sole respondent had applied for closure of the contract on 3.10.2015 which letter was received in the office and docketed with a diary number. He also admits that though the exact date on which the letter was received is not to his memory but does admit that the letter was docketed with Diary No. 166. He also admits that he was busy with election work prior to 31.12.2015 and that the date of receipt of the letter dated 03.10.2015 is not mentioned. The evidence of the Executive Engineer concerned as P.W. 3 confirms to the filing of the letter dated 03.10.2015 by the sole respondent. Even though Mr. Mangalam has been rather assertive on his argument that the letter is ante dated and has been created for the purpose of saving the election which otherwise stood void under Section 9A of 'the R.P. Act' but neither any evidence was led by Mr. Mangalam on behalf of the election petitioner in support of such allegation or on the ante dating of the document. In fact, the letter of the sole respondent at Ext. 9/L when considered along side the progress report marked Ext. A and the measurement book marked Ext. 12, is an answer to each objection and to every form of allegation on its genuineness.

As I have already observed at the very outset, there is a marked distinction between a circumstance where a contract has been rescinded, which in the present case happened through Ext. 10 on 09.04.2016, as against the circumstance which reflected that the contract was no more subsisting in between proprietor of the firm and the Executive Engineer on behalf of the appropriate Government. The veracity of the entry in the measurement book has not been doubted and which confirms that no construction work was carried out since after 18.3.2015. Ext. A series has been much relied upon by Mr. Mangalam and which again confirms that the construction work was stopped since after September, 2015, if not earlier. My observations are not to be construed as an acceptance of the submission of Mr. Mangalam that work continued after March 2015 because even the progress report at Annexure-A series does not suggest thus. My observations are simply for testing the averments after giving a long rope to the objections raised by the election petitioner to canvass that the contract was subsisting however the allegation is not found supported with the material evidence on record. The judgment of the Supreme Court in the case of **Aslhing** (supra) is somewhat similar to the case in hand and taking note of similar objections as raised therein, that the Supreme Court rejected the objection to dismiss the appeal. In the said case a similar objection for disqualification of the respondent was raised under Section 9A of 'the R.P. Act'. Having lost before the High Court that the matter reached the Supreme Court where it was noted that the respondent-winning candidate had written a letter on 03.11.1979 to the Executive Engineer that he was closing the contract. The last date for filing nomination was

10.12.1979. According to the appellantelection petitioner, the contents of the letter did not reflect that the contract had come to an end. The Supreme Court on going through the contents of the letter held thus:

**"After going through the contents of the letter it is absolutely clear that the contractor unilaterally put an end to the contract and informed the Department concerned accordingly and also he had resigned from the contractor's list of PWD Manipur. Thus after this letter the contract came to an end by breach and the contract was no longer subsisting. Mr. Rangarajan has submitted some very nice and delicate questions for consideration. One of them being that until and unless the letter is accepted by the Authority the contract would continue and thus the respondent would suffer from the disqualification. In our opinion having regard to the contents of the letter it is not , possible to accept the argument of Mr. Rangarajan that the contract was subsisting. The acceptance of the letter by the authorities was unnecessary for putting an end to the contract although the breach may give rise to a cause on action for damages....."**

Chapter IV of the Contract Act deals with the 'Performance of Contracts' and section 37 outlines the obligation of the parties to a contract which reads thus:

**"37. Obligations of parties to contracts.-**

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract."

A plain reading of the stipulation manifests that parties to a contract are bound to perform on their respective promises under a contract.

Section 39 of the Contract Act provides for the effect of refusal of a party to perform his promise and reads thus:

**"39. Effect of refusal of party to perform promise wholly.-** When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

I have referred to the provisions underlying section 37 and 39 of the Contract Act to demonstrate that while there is no contest on the obligation of the parties to a contract in performance of their respective promises, where either of the parties to a contract, fails to perform his part, the other would be well within his right to end the contract. A corollary thereto is, that the moment either of the parties to a contract refuses to perform his part of promise, the contract cannot be held to be subsisting rather the default by a party to a contract in performing his part of promise has brought the contract to a closure in so far as his discharge is concerned and whereafter it is upon for the other party to take legal recourse as per the stipulations present in the agreement which would include a rescission of the contract. It can be safely concluded that an order rescinding a contract attaches finally to a situation of non subsistence of contract, on account of default by any of the parties to a contract in performance of his obligation. In short the order rescinding a contract confirms that the contract was not subsisting.

I am persuaded in this connection to observe that there is nothing on the record of the proceeding which would demonstrate that any attempt was made either by the sole respondent to reinstate construction work on the project which was stopped since after 18.03.2015 or on the part of the department to enforce the contract. That the contract had come to a stand still position, a mere absence of rescission order in no manner would provide strength to the election petitioner to canvass her allegations. In fact even though the election petitioner has deposed that she was aware of the contract allotted to the sole respondent yet she raised no objections at any stage of the election process on the disqualification complained of herein rather it is having lost the contest that the issue has been raised.

The evidence of the officials of the department who have been examined as P.W. 3, Awadh Kishore Singh, Executive Engineer, LAEO; R.W. 4 Kamalesh Chaudhary, Chief Engineer; R.W. 5 Bidu Bhushan Prasad, Director, Department of Information and Public Relation; R.W. 6, Dharam Dev Chaudhary, Engineer In Chief cum Additional Commissioner cum Special Secretary and R.W. 7 Md. Hussain Alam, Junior Engineer, LAEO Work Division II on the issue that neither did the sole respondent bother to upload his application for online registration nor did he continue with the construction work after March, 2015 rather expressed clear indications for closure of the contract through letter dated 03.10.2015 which was acted upon to result in the cancellation of the contract vide order dated 09.04.2016 at Ext. 10, lends conclusive support to the stand of the respondent.

Having considered the issue in the backdrop of the oral and documentary evidence on record, the legal position on the subject, the provisions of the Contract Act and the view expressed by Supreme Court in similar situation, I am persuaded enough to hold that the contract in between sole respondent as proprietor of the firm and the Executive Engineer, LAEO on behalf of the appropriate Government, was not subsisting on the date of filing of the nomination form rather had come to a close by the conduct of the sole respondent as it stands supported by the evidence on record. The issue thus raised by the election petitioner seeking disqualification of the sole respondent under Section 9A of 'the R.P. Act' does not find support from the evidence on record as well from the statutory provision regulating the issue and is accordingly rejected. Issue nos. IV & V are decided accordingly.

The discussions on the issue above are sufficient to hold that the election of the sole respondent to the 93 Barhara Constituency in the district of Bhojpur suffers no disqualification under Section 9A of 'the R.P. Act' requiring any interference.

In result, the election petition is dismissed but without any order as to costs.

(Jyoti Saran, J)

By order,  
ANAND KUMAR PATHAK,  
SECRETARY,  
ELECTION COMMISSION OF INDIA.

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